IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 29, 2008 Session

STATE OF TENNESSEE v. TONY BEST

Direct Appeal from the Criminal Court for Monroe County
No. 04184 Carroll L. Ross, Judge

No. E2007-00296-CCA-R3-CD - Filed September 25, 2008

A Monroe County Criminal Court jury convicted the appellant, Tony Best, of attempt to manufacture methamphetamine and felony possession of drug paraphernalia. The trial court sentenced him as a Range I, standard offender to two years and one year, respectively, to be served concurrently on probation following a thirty-day jail term. On appeal, the appellant contends that (1) the warrantless search of boxes allegedly belonging to him and the seizure of his person violated the Fourth Amendment; (2) the State's destruction of evidence violated due process; (3) the evidence is insufficient to support his convictions; (4) his convictions for attempt to manufacture methamphetamine and felony possession of drug paraphernalia place him in double jeopardy for the same conduct; (5) the State erroneously failed to provide a bill of particulars after being ordered to do so; (6) the prosecutor committed prosecutorial misconduct in closing argument; and (7) his fines are excessive. Based upon the record and the parties' briefs, we affirm the appellant's judgment of conviction for felony possession of drug paraphernalia but reverse his conviction for attempt to manufacture methamphetamine because the evidence is insufficient to support the conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part and Reversed in Part.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which, JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Robert L. Jolley, Jr., Knoxville, Tennessee, for the appellant, Tony Best.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Robert Steve Bebb, District Attorney General; and J. Chalmers Thompson and James Stutts, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

This case arises from the discovery of three boxes containing the ingredients and equipment necessary to manufacture methamphetamine in a trailer belonging to Roy Worley and the subsequent stop and seizure of the appellant upon his arrival in Worley's driveway. Detective Jeb Brown, a narcotics agent with the Monroe County Sheriff's Department, testified that he had been trained and certified by the Drug Enforcement Administration (DEA) to recognize and safely dismantle methamphetamine laboratories. According to Detective Brown, ephedrine or pseudoephedrine, which is found in cold and allergy tablets such as Actifed, is a necessary ingredient for methamphetamine. Individuals use gas-line antifreeze such as Heat to separate the ephedrine from the binder in the pills. The ephedrine is combined with iodine crystals, which are made by mixing iodine with hydrogen peroxide and muriatic acid, and with red phosphorus, which is obtained from scraping the striking plates on matchbook covers or soaking them in acetone. The mixture of ephedrine, iodine crystals, and red phosphorus creates a three-layer "meth oil." The top layer of the oil is removed and subjected to a "gassing off" procedure in which balls of aluminum foil are added to muriatic acid, producing a gas that turns the oil into the finished product. Detective Brown stated that once a methamphetamine laboratory is located, dismantled, and logged, he calls a hazardous waste contractor to dispose of the chemicals.

Detective Brown testified that on May 3, 2004, he went to Roy Worley's mobile home on Little Notchy Creek Road. When he and the other officers arrived, Worley, Mary Kerr, Pam Sloan, and another male were in the yard. After speaking with all of them, Detective Brown searched the residence and found in a bedroom two green plastic "packers" or containers and a cardboard box. All three contained items used to make methamphetamine. One of the plastic containers had a lid. The containers and the box were carried outside, and their contents were set out in Worley's yard and photographed. They contained camp fuel, acetone, coffee filters, Heat, numerous matchbooks, hydrogen peroxide, muriatic acid, Red Devil lye, Pyrex glassware, a beaker, tubing, aluminum foil, sandwich bags, a wire strainer, and Mason jars, some of which contained sludge. Detective Brown explained that in making methamphetamine, camp fuel can be used as a substitute for acetone to break substances down or it can be used to "wash" the final product. Coffee filters are used to filter the various liquids once they are separated. Red Devil lye is used to increase the pH level of the mixture and to cause the three-part liquid to separate. Pyrex glassware is used to heat and dry the ephedrine "pill wash." The corners of sandwich bags are cut off and used to package the methamphetamine for sale. The wire strainer found in the boxes would have been used in the filtering process and contained a red stain. Detective Brown also found in the boxes a container holding eight balls of aluminum foil.

Detective Brown testified that he found butane and around forty tablets of cold medicine in the residence. He stated that depending upon the milligram measure of the pills, it generally takes large quantities of pills to produce methamphetamine. He also found items used to take drugs–needles, pipes and a spoon–in the residence. According to Brown, iodine was the only

substance necessary to manufacture methamphetamine that was missing from the scene.

Detective Brown testified that after he searched the residence, Worley and Kerr were arrested and taken to jail. Before the officers removed the boxes of items from the residence, the appellant turned into the driveway driving a Nissan 240. Detectives Morgan and Shaw approached him and removed him from his car. Detective Shaw walked with the appellant to the top of the hill, while Detective Morgan drove the appellant's car to the top of the driveway, where the appellant was frisked and his car was searched. Detective Brown searched the appellant's car and found an open box of Actifed. Although the package stated that the box contained twelve pills, he found ninety-six pills in the box. The package also revealed that the pills each contained sixty milligrams of pseudoephedrine. Each of the individual blister packs in which the pills were contained listed pseudoephedrine as an ingredient. Detective Brown also found a digital scale in the appellant's car that would measure amounts as small as .1 gram. Based upon his training and experience, he believed these scales were used to measure drugs. The box containing the scales had traces of an off-white substance in it, but he did not have the substance tested. Detective Brown also found an electronic body wire detector in the appellant's car. This device would emit a whistling noise when placed near a police wire.

Detective Brown testified that the appellant was frisked, and officers found a syringe, a box cutter, razor blades, and a match holder containing small Ziploc-style bags of the size normally used for jewelry or coins on the appellant's person. Detective Brown stated that methamphetamine can be eaten, snorted, smoked, or injected with a needle. He also testified that razor blades can be used to scrape matchbooks as well as dried ephedrine and that the small bags like the mini-Ziplocs can be used to package methamphetamine. After finding these items, Detective Brown arrested the appellant and charged him with attempting to manufacture methamphetamine and felony possession of drug paraphernalia.

On cross-examination, Detective Brown testified that Worley's trailer was located on top of a hill and that his driveway was about forty yards long. The appellant pulled into the bottom of the driveway. At that time, officers were probably carrying items out of the trailer but had not set them out to be photographed. The police had been at the residence at least thirty minutes before the appellant arrived, and Worley and Kerr had already been taken into custody. Detective Brown acknowledged that the police did not identify the appellant's fingerprints in the residence or on any of the items in the boxes. Also, no methamphetamine was found in the residence. He agreed that each of the products taken from the residence, except for some marijuana, had a legitimate use.

On redirect examination, Detective Brown testified that the majority of items he found at methamphetamine laboratories were turned over to a hazardous waste contractor rather than taken to the police station. Some items from laboratories were sent to the crime laboratory for testing. Although the appellant did not have all of the ingredients necessary to manufacture methamphetamine in his car, all of the items taken from his car could be used to make or sell methamphetamine. On recross-examination, Detective Brown agreed that manufacturing methamphetamine was not the exclusive use of the items found in the appellant's car.

At the conclusion of the proof, the trial court granted a judgment of acquittal to the appellant's codefendant, Mary Kerr. The jury convicted the appellant of attempt to manufacture methamphetamine and felony possession of drug paraphernalia. The jury also assessed fines of $5,000 and $3,000, respectively, for the two convictions.

II. Analysis

A. Search and Seizure Issues

The appellant contends that the trial court should have suppressed the evidence located in the boxes found in Worley's bedroom because Worley did not have authority to consent to a police search of the boxes, which Worley claimed belonged to the appellant. The appellant also asserts that the police lacked reasonable suspicion or probable cause to stop or search him when he pulled into Worley's driveway. The State maintains that the appellant had no expectation of privacy in the boxes that he voluntarily left at Worley's residence. It also contends that the police had probable cause to stop the appellant when he entered Worley's driveway. We conclude that the search of the boxes and the stop and search of the appellant did not violate the Fourth Amendment or the Tennessee Constitution, article 1, section 7.

At the suppression hearing, Detective Brown testified that after lunchtime on May 3, 2004, he went to Worley's residence, having received information that it contained illegal items or items with an illegal purpose. When he arrived, he met Worley in the yard and explained why he was there. Worley gave consent to search the residence. Inside, Detective Brown found numerous components used to manufacture methamphetamine. The majority of these items were in a green plastic bin. Detective Brown stated that he was trained and certified by the DEA to identify and safely dismantle methamphetamine laboratories. Based upon his training and experience, the quantities of the items found in the bin indicated that their purpose was to manufacture methamphetamine. Pseudoephedrine was the only ingredient necessary to make methamphetamine that was missing from the bin.

Detective Brown testified that he found one large "packer," which he described as a plastic container used to pack items for storage; a small packer; and a cardboard box in Worley's trailer. The cardboard box was open, and he could see into it. He identified a picture taken before the containers were searched, which showed that only the large container was closed. Detective Brown testified that nothing on the containers revealed to whom they belonged. Worley told him that the appellant had left the containers at his trailer and that he did not know what they were. After looking in the containers, Worley said that they belonged to the appellant, that the appellant said he was going to town, and that the appellant was coming back to get them shortly. Then, Worley identified a car traveling past his trailer as the appellant's. Detective Brown remained at the scene while Detective Shaw stopped the car. It was not the appellant. Sometime later, the appellant did arrive at the residence.

Detective Brown testified that officers carried the containers and the cardboard box outside

and placed their contents onto a sheet to be photographed before they were picked up by the Hazardous Materials Team. He had no record of which items came from which box, although he identified Mason jars and aluminum foil in the smaller, open plastic container from a photograph taken before he searched the boxes. The photograph of the items on the sheet showed that the boxes contained six one-quart Mason jars, at least two of which contained liquid. Detective Brown stated that he did not perform chemical tests on these unknown liquids because he was trained to collect samples only of layered liquids for testing. Some of the items found appeared to have been opened and varied as to how much of their contents had been used.

Detective Brown testified that he was trained to call the Hazardous Materials Team when he seized items from a methamphetamine laboratory. The team destroyed all of the items listed on the evidence log in this case. He stated that although the items might appear to be ordinary household products such as a bottle of hydrogen peroxide, he had no way to know whether a mixture had been made inside an opened product, unless he conducted chemical tests. He also said that "it's just not safe to store all these chemicals together."

Detective Brown testified that about fifteen to thirty minutes after he and the other officers arrived on the scene, the appellant arrived at Worley's residence. The officers were going through the containers and had already decided that the items appeared to be the components for a methamphetamine laboratory. The appellant pulled halfway up Worley's driveway, which was thirty to forty yards long, saw the officers, and tried to leave. Detectives Shaw and Morgan stopped the appellant, removed him from his car, and walked him up to the residence. Detective Morgan drove the appellant's car up to the residence. The appellant was frisked for officer safety. He had a hypodermic needle and a small cannister containing Ziploc-style jewelry bags on his person.

Detective Brown testified that he searched the appellant's car and found Actifed cold tablets, which contain ephedrine or pseudoephedrine, a necessary ingredient for methamphetamine production. He also found a set of digital scales, a metal scraping device that held razor blades, and an electronic device used to detect undercover transmitter wires. Detective Brown had encountered scales in other narcotics investigations and said they were used to weigh narcotics. He had seen razor blades, which are used to scrape extracted ephedrine, dried methamphetamine, and matchbooks, at every methamphetamine laboratory he had investigated. Detective Brown charged the appellant with possession of drug paraphernalia and attempted manufacture of methamphetamine because of the items found in the residence as well as the items found on the appellant's person.

On cross-examination, Detective Brown testified that he had gone to Worley's residence to speak with Donnie Yates. Either earlier that morning or the previous day, the police had found trash containing methamphetamine components and pill bottles belonging to Yates at another location. Their investigation revealed that Yates lived at Worley's residence. Although Yates was not there when Detective Brown arrived, Yates and two females came to the residence shortly thereafter. He believed that he searched Yates.

Detective Brown testified that the only information he had about the plastic containers and

the cardboard box found in the bedroom in Worley's trailer came from Worley. Worley identified the containers and the box as belonging to the appellant before Detective Brown entered the bedroom where they were located and before he had searched them. He agreed that he did not have the appellant's permission to search the containers and the box and that he did not ask Worley if Worley had the appellant's permission to go through them. He did not go to Worley's residence looking for the appellant, and Worley was not working as a police informant. Other than a prior arrest for a probation violation, neither he nor any of the other officers on the scene had a relationship with Worley. None of the other people at Worley's residence mentioned the appellant. After Worley told him that the containers and the box belonged to the appellant, Worley identified a car driving past the residence as belonging to the appellant. Detective Shaw stopped the car and learned that it was not the appellant. Worley's trailer was on a small hill, and the identification was made during the daylight in good weather. Detective Brown agreed that Worley had given the police false information about this car. When the officers attempted to arrest Worley, he physically assaulted Detectives Brown and Shaw. Worley was transported from the scene before the appellant arrived.

Detective Brown testified that the appellant's name was not on the plastic containers or cardboard box found in Worley's trailer. The officers tested the "packages" for fingerprints and collected some partial prints. At the time of the suppression hearing, the partial prints had been sent to a crime scene investigator but had not been identified. Detective Brown agreed that he had testified at the preliminary hearing that he thought Detective Shaw tested four of the Mason jars for fingerprints and that no identifiable prints were collected. He explained that he meant that only partial fingerprints were obtained from the jars.

Detective Brown testified that the appellant pulled into Worley's driveway and then immediately started backing out. Detectives Shaw and Morgan drew their weapons and stopped the appellant. Detective Brown agreed that at that time, the officers had no information that the appellant had committed a traffic violation or that he had anything illegal in his car. He believed the officers still had their guns drawn when they removed the appellant from his car. Detective Brown did not remember whether the appellant was handcuffed at that time. He acknowledged that he stated in the affidavit of complaint and testified at the preliminary hearing that he found the mini-Ziploc bags in the appellant's car rather than on his person. He believed that these earlier accounts were more accurate because the events were fresher in his mind at the time he gave them. He agreed that he had testified at the preliminary hearing that after searching the appellant's car, he placed the appellant under arrest.

On redirect examination, Detective Brown testified that on the day of the search, Worley appeared to be sober. The police had the appellant's car towed from Worley's residence, and they would have inventoried its contents before it was towed. The appellant was known to Detective Brown and other officers as a methamphetamine user and cook. On recross-examination, Detective Brown testified that he knew of the appellant's reputation from a confidential source, but he was not relying "solely" on that confidential source at the time the officers stopped the appellant. Instead, they stopped the appellant based upon the information they received from Worley.

Roy Worley testified that on May 3, 2004, Detective Brown and several other officers came to his home on Little Notchy Creek Road asking for Donnie Yates. Worley had previously run Yates off because they were fighting, and he told the officers that Yates did not live there. An officer told Worley that he believed methamphetamine had been cooked at the residence, but Worley denied it. The officers asked to search the residence, but Worley did not answer their question.

Worley testified that the appellant had left a box at his home about twenty minutes before the officers arrived. Once he saw the contents of the box, he told the officers that it belonged to the appellant. He also told them that the appellant was supposed to return in about thirty minutes to get the box. He said he was upset with the appellant when he saw what the box contained. The officers asked him why he had allowed the appellant to leave the box at his trailer. He explained that the appellant had asked to leave the box there because he was going to town to pick someone up and did not have room for the person with the box on the front seat of his car. Worley had told the appellant that the appellant could leave the box but that he would probably not be there when the appellant returned. He said he was trying to unlock Ms. Kerr's car and did not watch the appellant carry the box, which had a lid, into the house. He guessed that the appellant must have taken the other box into the house when he was not looking. He did not see anyone else carry anything into his house. As the appellant got into his car, he told Worley that he would be back in a few minutes. Worley identified for the officers a car driving past his residence as belonging to the appellant. He said that the car was similar to the appellant's and that he thought it was the appellant's because it was traveling at a high rate of speed. Then, Worley was involved in a "scuffle" with the officers and was taken to jail before the appellant returned.

Worley testified that he had entered guilty pleas in all his cases and was on probation. He stated that he had used methamphetamine in the past but that at the time of the present search, he was no longer using it. At that time, he had "tried to get away from the whole deal."

On cross-examination, Worley testified that he ran Yates off two weeks before the search of his residence. Yates had not been at his trailer earlier that day or the evening before. Worley took his own trash to the city dump daily, but he had not taken it on the day of the search or the previous day. Yates came to his trailer while the officers were there, but the police did not question Yates. The appellant lived down the road from him and visited his home frequently. The appellant made one trip into his house carrying a green box with a lid. Worley did not see the appellant make other trips into the house but assumed that the appellant took the other boxes inside after he carried in the first box.

Worley testified that he did not give consent for the officer to enter his trailer. He said that the officer followed him into his house and through it. He agreed that he did not turn around and tell the officer not to come inside. He was never asked to sign a consent form. He lifted the lid on the green box and saw some jars inside. The officer was standing over his shoulder and saw into the box at the same time he did. At that point, he told the officer that the boxes were not his. He gave consent for the officer to look through the boxes. He believed that he had authority to consent to a search of the boxes because it was his home. After he dropped the lid on the green box, he turned

and went out. He told the officers that the appellant would be back to get the boxes and walked to the front door, and the officers began to arrest him. At that point, a scuffle ensued. The officers were already angry with him because he had pointed out the wrong car as being the appellant's, and an officer hit him on the head as he was telling them that the appellant would return in thirty to thirty-five minutes.

On redirect examination, Worley testified that he could not read or write. He had a .22 revolver on his person when the incident occurred, but he said that he would not have drawn it.

1. Search of Containers

The appellant does not challenge Worley's consent to the officers' search of Worley's home but instead argues that Worley lacked authority to consent to a search of the two plastic containers and the cardboard box that Worley claimed belonged to the appellant. The State argues that if the appellant had an expectation of privacy in the containers, he abandoned this expectation when he left the containers in Worley's custody. The trial court denied the appellant's motion to suppress on this issue, finding that once the police were properly searching Worley's home, they could search anything on the premises.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution provide protection for citizens against "unreasonable searches and seizures." Generally, a warrantless search is considered presumptively unreasonable, thus violative of constitutional protections. See State v. Walker, 12 S.W.3d 460, 467 (Tenn. 2000); see also Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971).

Regardless of whether the appellant had a legitimate expectation of privacy in the containers or whether Worley could consent to the container's being searched, we can conclude that the appellant is not entitled to relief on this issue. The record reflects that Worley, not Detective Brown, lifted the lid of the third, closed container, exposing its contents to the officer's plain view. Items fall within the "plain view" exception to the warrant requirement if (1) the seized items were in the officer's plain view, (2) the officer was rightfully in the position from which he or she viewed the items, and (3) the items had an incriminating nature that was immediately apparent to the officer. State v. Cothran, 115 S.W.3d 513, 524-25 (Tenn. Crim. App. 2003) (holding that the items no longer have to be inadvertently discovered in order for the plain view doctrine to apply). In the present case, the methamphetamine components were in Detective Brown's plain view when he entered the bedroom and Worley lifted the lid on the one closed container. Detective Brown was legitimately in the bedroom pursuant to Worley's consent. Based upon Detective Brown's training regarding methamphetamine laboratories, he recognized the items in the three containers to be ingredients and equipment used in manufacturing methamphetamine. Accordingly, the contents of the two plastic containers and the box were properly discovered pursuant to the plain view exception to the warrant requirement.

2. Stop and Search of Appellant

The appellant also argues that the officers violated his Fourth Amendment rights by stopping him at gunpoint and subsequently conducting a warrantless search of his person and car. He maintains that the officers had neither probable cause nor reasonable suspicion when they stopped and searched him. Specifically, he asserts that the officers could not rely upon the statements of Roy Worley because Worley was a criminal informant whose credibility and reliability were not sufficiently corroborated by the police. The State contends that the information from Worley that the containers of methamphetamine components in his residence belonged to the appellant along with independent police corroboration provided probable cause to stop and search the appellant. We conclude that the officers had probable cause to stop and arrest the appellant and that the appellant's person and car were properly searched incident to his arrest.

"An automobile stop constitutes a 'seizure' within the meaning of both the Fourth Amendment to the United States Constitution, see Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), and article I, section 7 of the Tennessee Constitution, see State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993)." State v. Berrios, 235 S.W.3d 99, 105 (Tenn. 2007) (footnote omitted). One exception to the warrant requirement is an arrest based upon probable cause to believe that a crime has been or is being committed. Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225-26 (1964); State v. Henning, 975 S.W.2d 290, 300 (Tenn. 1998). Tennessee Code Annotated section 40-7-103(a)(3) provides that an officer may arrest a person without a warrant "[w]hen a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed [it]." Our supreme court has explained that "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act," constitutes probable cause. Henning, 975 S.W.2d at 294. Courts should determine the existence of probable cause after assessing all of the information available to the officer at the time of arrest. See State v. Lawrence, 154 S.W.3d 71, 75-76 (Tenn. 2005); State v. Bridges, 963 S.W.2d 487, 491 (Tenn. Crim. App. 1997).

In the present case, the officers had discovered three boxes of ingredients and equipment used in manufacturing methamphetamine. Detective Brown testified that his training and expertise in methamphetamine laboratories allowed him to recognize that the purpose of the items in the boxes was to manufacture methamphetamine because of the quantities of items collected in the boxes. Based upon the discovery of the three containers of methamphetamine components, it was probable that someone was attempting to manufacture methamphetamine, which is a felony in Tennessee. See Tenn. Code Ann. §§ 39-12-107(a), -17-417(c)(2). Thus, we turn to the question of whether the officers reasonably believed that the appellant was involved in attempting to make methamphetamine.

Most of the information linking the methamphetamine components to the appellant came from Worley. Worley told the officers that the containers of methamphetamine components belonged to the appellant, who had stopped at his trailer about twenty minutes before the officers arrived and asked if he could leave a box there. Worley said the appellant claimed to be on his way

to pick up someone and did not have room in his car for the passenger with the box on the front seat. Worley said that as the appellant left, he stated that he would be back shortly to retrieve the box. The appellant argues that the officers could not rely upon Worley's information to provide probable cause for the stop because Worley was neither reliable nor credible as a criminal informant.

Although known citizen informants typically enjoy a presumption of reliability, informants from the criminal milieu do not. See State v. Melson, 638 S.W.2d 342, 354-56 (Tenn. 1982) (providing that information supplied by a known citizen informant is presumed to be reliable); see also State v. Luke, 995 S.W.2d 630, 637 (Tenn. Crim. App. 1998). Here, the State does not dispute that Worley is a criminal informant whose reliability must be proven, as opposed to a citizen informant. If a stop is based upon a criminal informant's tip, the factors set forth in State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989), are used to determine whether the informant's tip established probable cause. Pulley, 863 S.W.2d 29, 31 (Tenn. 1993). In Jacumin, 778 S.W.2d at 436, our supreme court espoused the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584 (1969). According to Aguilar, there must be a "basis of knowledge" when an officer relies on an informant's tip. Id. at 432. The test also requires a showing that the informant is credible or the information is reliable. Id. "[I]ndependent police corroboration of the information provided by the informant may make up deficiencies in either prong." State v. Powell, 53 S.W.3d 258, 263 (Tenn. Crim. App. 2000).

To satisfy the basis of knowledge prong, the facts must reveal "whether the informant had a basis for his information or claim regarding criminal conduct." State v. Lowe, 949 S.W.2d 300, 304 (Tenn. Crim. App. 1996). Specifically, "[t]he informant must describe the manner in which he gathered the information, or the informant must describe the criminal activity with great particularity." State v. Steven Woodard, No. 01C01-9503-CR-00066, 1996 WL 76022, at *2 (Tenn. Crim. App. at Nashville, Feb. 23, 1996). In the present case, Worley's statements reveal that he was an eyewitness to the appellant leaving the large container at his home. Thus, there is a sufficient basis of knowledge.

With regard to the credibility prong of the Jacumin test, the officers had no prior relationship with Worley, other than a previous arrest for a probation violation, and had not used him as an informant in the past. Moreover, as the appellant points out, Worley initially misidentified another car as being the appellant's. Our supreme court has observed that "[p]olice corroboration of several details of the informant's report may also satisfy unknowns about the informant's credibility." State v. Simpson, 968 S.W.2d 776, 782 (Tenn. 1998). Additionally, when an informant has predicted future behavior, verification of the predicted behavior serves to corroborate the informant's reliability. Id. (analyzing reliability of confidential informant who accurately described defendant's "location and direction of travel, the time of arrival, and" his car). Here, Worley told the officers that the appellant would be returning to his trailer in about thirty minutes to retrieve the containers of methamphetamine components. Detective Brown testified that the appellant pulled into Worley's driveway fifteen to thirty minutes after the officers arrived on the scene. The appellant drove half-way up the forty-yard-long driveway and then immediately attempted to leave. At this time, the officers were carrying the containers of methamphetamine components out of the trailer. Finally,

a photograph of the appellant's car, admitted at the suppression hearing, reveals that it was a small sports car and that there would have been no room for a passenger with the boxes of methamphetamine components on the front seat. Thus, Detective Brown's independent observations corroborated the information Worley provided.

We also note that Detective Brown testified that the appellant's reputation as a methamphetamine user and cook was known to himself and the other officers. He stated that he had learned of the appellant's reputation from a confidential source, but he was not relying on information from that source to stop the appellant in Worley's driveway. An officer may rely upon his or her knowledge of a defendant's reputation as one of the "'practical considerations of everyday life'" he or she uses to determine the reliability of an informant's tip. United States v. Harris, 403 U.S. 573, 582-83, 91 S. Ct. 2075, 2081 (1971) (quoting Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310 (1949)); but see Bridges, 963 S.W.2d at 491 (cautioning that police knowledge of a defendant's reputation alone is not sufficient to establish the reliability of an informant). Thus, Detective Brown's prior knowledge of the appellant's reputation likely caused him to give credit to Worley's statement that the containers of methamphetamine components belonged to the appellant, although he had not gone to Worley's residence looking for the appellant. This information alone is not sufficient to show Worley's reliability, but it lends additional support to the independent police corroboration discussed above. Accordingly, the credibility prong of the Jacumin test is also satisfied.

We hold that Worley's information, the discoveries in the trailer, and the appellant's arrival and furtive actions provided the officers with probable cause to believe the appellant was attempting to manufacture methamphetamine. Therefore, the officers had probable cause to stop him in Worley's driveway and arrest him. See Beck, 379 U.S. at 91, 85 S. Ct. at 225; Henning, 975 S.W.2d at 300. Although Detective Brown testified the appellant was formally arrested after the police searched his car, the appellant was under full-scale arrest when the police stopped him at gunpoint, removed him from his car, and walked him up the driveway. See State v. Crutcher, 989 S.W.2d 295, 301-02 (Tenn. 1999) (stating that an arrest occurs when there is an "actual restraint on the arrestee's freedom of movement under legal authority of the arresting officer" and that in order to demonstrate an arrest "some words or actions should be used that make it clear to the arrestee that he or she is under the control and legal authority of the arresting officer, and not free to leave"). The police could then search his person and the passenger compartment of his car incident to that arrest. See New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 2864 (1981); Chimel v. United States, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040 (1969). We ascertain no violation arising from the seizure and search of the appellant or the search of his car under the Fourth Amendment or the Tennessee Constitution, article 1, section 7.

B. Destruction of Evidence

The appellant contends that the State's destruction of the methamphetamine components found in the three containers denied him the right to a fair trial. He asserts that destruction of the evidence deprived him of the opportunity to prove that it was not his by conducting fingerprint tests

on it. The State argues that it had no duty to preserve the methamphetamine components, which were destroyed for safety reasons, because further testing was deemed unnecessary. Moreover, it maintains that the appellant was not harmed by the destruction of the evidence because some of the methamphetamine components were tested for fingerprints and Detective Brown testified on cross-examination that the appellant's fingerprints were not found on the components.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). Accordingly, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

In State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999), our supreme court addressed the issue of when a defendant is entitled to relief when the State has lost or destroyed evidence that was alleged to have been exculpatory. The court explained that a reviewing court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Id. at 917. Ordinarily, "the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. However,

> "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Id. (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534 (1984) (footnote and citation omitted)).

Ferguson also directs that if the proof demonstrates the existence of a duty to preserve the evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

> 1. The degree of negligence involved;
>
> 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
>
> 3. The sufficiency of the other evidence used at trial to support the conviction.

Id. (footnote omitted). If the court's consideration of these factors reveals that a trial without the missing evidence would lack fundamental fairness, the court may consider several options such as dismissing the charges or providing an appropriate jury instruction. Id.

Generally, a trial court's decision to admit or exclude evidence at trial will not be overturned absent an abuse of discretion. State v. James, 81 S.W.3d 751, 760 (Tenn. 2002); see also State v. William C. Tomlin, Jr., No. M2003-01746-CCA-R3-CD, 2004 WL 626704, at *3 (Tenn. Crim. App. at Nashville, Mar. 30, 2004). An abuse of discretion exists when the "'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

At the suppression hearing, the appellant raised the issue of the destruction of the methamphetamine components. The trial court questioned the destruction of the contents of the three containers found in Worley's trailer, noting that the items contained therein were common, household products that could be readily purchased at a store. Detective Brown testified that he was trained to have a Hazardous Materials Team destroy the chemicals seized from methamphetamine laboratories because the opened bottles of methamphetamine components could contain chemical mixtures. He stated that "it's just not safe to store all these chemicals together." Some of the methamphetamine ingredients taken from Worley's residence were partially used. With the household products in the three containers, Detective Brown found Mason jars that held unknown liquids. These liquids were not tested because he only sends layered liquids for testing. On cross-examination, Detective Brown testified that fingerprint testing was attempted on some of the glass Mason jars but that only partial prints were collected. At the conclusion of the suppression hearing, the trial court continued to express concern about the destruction of the methamphetamine components but made no factual findings or ruling on the matter.

At trial, Detective Brown testified that when he encounters a methamphetamine laboratory, he contacts the Hazardous Materials Team, which comes to the scene "for [the officers'] support and if [they] need anything as far as safety goes[.]" Once the methamphetamine laboratory is dismantled and logged, a hazardous waste contractor disposes of the chemicals. On cross-examination, he acknowledged that the appellant's fingerprints were not identified on any of the items from the trailer that were depicted in the photographs shown to the jury. The appellant next raised the issue of the destruction of the methamphetamine components in his Amended Motion for a New Trial, arguing that the trial court should not have admitted evidence of items intentionally destroyed by the state. The trial court denied the amended motion but again made no findings or specific ruling on the destruction of evidence issue.

Initially, we note that the appellant first raised this issue by making an oral objection during Detective Brown's testimony at the suppression hearing. During argument at the close of the hearing, the appellant's counsel suggested that he might need to file a specific motion regarding the destruction of evidence. The trial court responded, "I'm not sure you need to file a specific motion but that may be something we need the Court of Appeals to address." Although the parties and the

trial court briefly discussed the constitutionality of officers destroying evidence from methamphetamine laboratories, no factual findings or ruling relating to this case were made. Moreover, the appellant did not object to the introduction of the photographs of the destroyed evidence at trial. Rule 36(a) of the Tennessee Rules of Appellate Procedure provides that this court is not obligated to grant relief to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Nevertheless, we believe the appellant's raising the issue at the suppression hearing sufficiently preserved the issue, albeit barely, for our review.

Our review of the testimony in light of Ferguson reveals that the State did not breach a duty to preserve the evidence. The State's duty to preserve evidence first turns upon whether the defendant would be entitled to receive the evidence in discovery. Ferguson, 2 S.W.3d at 917. Rule 16, Tennessee Rules of Criminal Procedure, permits a defendant to inspect tangible objects within the State's possession that are material to the preparation of the defense, that the State intends to use in its case-in-chief, or that were taken from or belong to the defendant. Tenn. R. Crim. P. 16(a)(1)(F). In the present case, the State used photographs of the methamphetamine components that were subsequently destroyed at trial. However, as noted above, the State's duty to preserve evidence also turns upon the materiality of that evidence. Ferguson, 2 S.W.3d at 917 (quoting Trombetta, 467 U.S. at 488-89, 104 S. Ct. at 2534). In this regard, our supreme court has directed that evidence is constitutionally material if it both possessed apparent exculpatory value before destruction and is of a type that other comparable evidence is not reasonably available to the defendant. Id.

Regarding the apparent exculpatory value of the evidence, the appellant argues that the State intentionally destroyed the methamphetamine components without testing them for fingerprints, which could have revealed whether they belonged to him, Worley, or the other people on the scene when the officers arrived. This court has previously examined the issue of the State's duty to preserve evidence upon which the defendant could have performed scientific testing that the defendant claims may have yielded exculpatory results. On the one hand, the State is not required to investigate cases in any particular way: "Due process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process." State v. Terry W. Smith, No. 01C01-9609-CC-00404, 1998 WL 918607, at *14 (Tenn. Crim. App. at Nashville, Dec. 31, 1998); see also State v. Donald Terry Moore, No. 01C01-9702-CR-00061, 1998 WL 209046, at * 9 (Tenn. Crim. App. at Nashville, Apr. 9, 1998) (observing that the State is not required to perform scientific testing, such as DNA analysis, on evidence), aff'd, 6 S.W.3d 235 (Tenn. 1999). Moreover, "[i]t is not the duty of this Court to pass judgment regarding the investigative techniques used by law enforcement unless they violate specific statutory or constitutional mandates." State v. Robert Earl Johnson, No. M2000-01647-CCA-R3-CD, 2001 WL 1180524, at *17 (Tenn. Crim. App. at Nashville, Oct. 8, 2001). Accordingly, when the police have not conducted a fingerprint analysis, there is typically no duty to preserve what is essentially nonexistent evidence. See State v. Kenneth Clay Davis, No. E2006-01459-CCA-R3-CD, 2007 WL 1259206, at *4 (Tenn. Crim. App. at Knoxville, Apr. 30, 2007), perm. to appeal denied, (Tenn. 2007) (holding with regard to the absence of a recording of the traffic stop that the "State cannot destroy evidence that does not exist"); State

v. Randall S. Sparks, No. M2005-02436-CCA-R3-CD, 2006 WL 2242236, at *5 (Tenn. Crim. App. at Nashville, Aug. 4, 2006) (holding that State had no duty to preserve recordings of drug transactions because recordings did not exist); see also John Darryl Williams-Bey v. State, No. M2005-00709-CCA-R3-PC, 2006 WL 2242263, at *7 (Tenn. Crim. App. at Nashville, Aug. 4, 2006) (affirming post-conviction court's finding that counsel was not ineffective for failing to seek non-existent fingerprint evidence or curative jury instruction therefor).

On the other hand, when the State seeks to use a piece of physical evidence or tests conducted thereon, a duty to preserve the evidence may arise. See State v. Gilbert, 751 S.W.2d 454, 460 (Tenn. Crim. App. 1988) (holding that when a defendant charged with DUI has given a blood sample for a blood-alcohol test, the defendant may rightfully request and receive a portion of that sample to submit for independent testing). In this situation, the defendant's request to inspect or test the same piece of evidence selected or tested by the State does not dictate to the police the type of investigation they must undertake. Instead, the police have already conducted the investigation and selected that evidence that they believed important. In State v. Sheri Lynn Cox, the trial court dismissed the presentment charging theft because the State lost the defendant's receipt books, which allegedly supported a shortage in funds. No. E2005-00240-CCA-R3-CD, 2005 WL 3369257, at *2 (Tenn. Crim. App. at Knoxville, Dec. 12, 2005). The loss of the receipt books, which had previously been examined by the State's accountant, denied the defendant the opportunity to analyze or audit them herself. Id. Despite acknowledging that a defense audit could have been either exculpatory or inculpatory, this court held that the State had a duty to preserve the receipt books because they were "material to the preparation of the [defendant's] defense." Id. at *3. Similarly, when an investigating officer makes a recording of the defendant's statement, the officer has a duty to preserve the recording even though the officer was not constitutionally required to make the recording initially. See Sparks, No. M2005-02436-CCA-R3-CD, 2006 WL 2242236, at *5; see also State v. Nathaniel Robinson, Jr., No. E2004-02191-CCA-R3-CD, 2005 WL 2276421, at *4 (Tenn. Crim. App. at Knoxville, Sept. 19, 2005) (holding that "the police had a duty to preserve the videotape [of the defendant in the booking area], even though they had no duty to make the tape in the first place").

In the present case, Detective Brown testified that the methamphetamine components in Worley's home were destroyed for safety reasons after some of the Mason jars had been tested for fingerprints. The duty to preserve evidence does not extend to that which the State cannot preserve. See Gilbert, 751 S.W.2d at 460 (holding that the defendant's right to a portion of his blood sample "presupposes that a sample or specimen is in existence at the time of the request; and the sample or specimen is of sufficient size or quantity that it can be made available to the accused or his expert"); see also Moore, No. 01C01-9702-CR-00061, 1998 WL 209046, at **9-10 (holding that the State did not violate the defendant's due process rights by testing a semen sample with a method that totally consumed the sample). Although this precept was formulated in cases in which the evidence was consumed during testing, we conclude that it also must necessarily apply to evidence that is too dangerous to retain. State v. Lonnie T. Lawrence, No. E2007-00114-CCA-R9-CD, 2008 WL 704355, at *11 (Tenn. Crim. App. at Knoxville, Mar. 17, 2008). In this regard, we note that many of the ingredients contained within the two plastic bins and the cardboard box had previously been

opened and partially used. Detective Brown stated that when encountering such items, he had no way of knowing whether someone had mixed other chemicals with the contents of those substances and that mixed chemicals were not safe to store. Also, the methamphetamine components included Mason jars containing unknown liquids. Several of the items in the box, such as the blackened Pyrex dishes, the balled aluminum foil, and the stained wire strainer, suggest that methamphetamine production had been undertaken with these ingredients at some earlier time. Thus, the evidence in the record supports Detective Brown's testimony that the methamphetamine components had to be destroyed for the safety of the officers. C.f., Lawrence, No. E2007-00114-CCA-R9-CD, 2008 WL 704355, at **11-12 (holding that the State had a duty to preserve evidence from alleged methamphetamine laboratory that the trial court had determined was not tainted or dangerous). This prong of the analysis weighs against a duty to preserve the evidence.

The final prong in the analysis of the State's duty to preserve evidence looks to whether other comparable evidence is available to the appellant. In the present case, the officers conducted fingerprint testing on some of the Mason jars but only discovered partial fingerprints. These partial fingerprints were not linked to the appellant, and during cross-examination at trial, Detective Brown testified that the appellant's fingerprints were not found on the methamphetamine components in Worley's residence. Thus, the appellant had comparable evidence–the results of the State's fingerprint testing–that he presented at trial. The appellant has failed to show that his own fingerprint analysis of the methamphetamine components could have resulted in exculpatory evidence beyond that he already presented through cross-examination of Detective Brown. Accordingly, we conclude that the State had no duty to preserve the contaminated evidence, and, therefore, the trial court did not abuse its discretion in admitting photographs of the methamphetamine components.

C. Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to support his convictions. With regard to his attempt to manufacture methamphetamine conviction, he argues that merely gathering the components to make methamphetamine is not sufficient to convict a person of the offense and that the record is devoid of any link between him and the methamphetamine components found in Worley's home. Regarding the felony possession of drug paraphernalia conviction, he argues that no evidence of intent to deliver exists. The State contends that the evidence is sufficient to support both convictions. We agree with the State as to the appellant's conviction for felony possession of drug paraphernalia, but we reverse his conviction for attempt to manufacture methamphetamine.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the

trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

1. Attempt to Manufacture Methamphetamine

The appellant argues that the gathering of methamphetamine components is not sufficient to demonstrate an attempt to manufacture the drug and that, in any event, no evidence links him to the methamphetamine components in Worley's home. We agree with the appellant that the evidence fails to link him to the components in Worley's home and, therefore, that the evidence is insufficient to support the conviction.

It is an offense knowingly to manufacture methamphetamine. Tenn. Code Ann. §§ 39-17-408(d)(2), -417(a)(1). "'Manufacture' means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis." Tenn. Code Ann. § 39-17-402(15). "A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense . . . [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." Tenn. Code Ann. § 39-12-101(a)(3). Under this definition of attempt, "[c]onduct does not constitute a substantial step . . . , unless the person's entire course of action is corroborative of the intent to commit the offense." Tenn. Code Ann. § 39-12-101(b).

In State v. David Long, this court reversed a conviction for manufacturing methamphetamine when the defendant was stopped with numerous unopened packages of cold medicine containing pseudoephedrine, three cans of starter fluid, instructions for manufacturing methamphetamine, matches, and a small amount of methamphetamine. No. W2003-02522-CCA-R3-CD, 2005 WL 525267, at **6-7 (Tenn. Crim. App. at Jackson, Mar. 4, 2005). The court concluded that the defendant had done no more than possess some of the ingredients used in manufacturing methamphetamine and that "[p]ossession is not equivalent to manufacturing." Id. at *6. Nevertheless, the court held that the proof established a "submissible case of attempted manufacturing methamphetamine" and remanded for a new trial on that offense. Id. at *7. In State v. Bradley Lonsinger, the court upheld the sufficiency of a conviction for attempt to manufacture methamphetamine when police found the defendant in a home containing thirty-seven ingredients used to make methamphetamine, smoking laboratory equipment, containers with a liquid residue, and an overwhelming chemical odor. No. M2003-03101-CCA-R3-CD, 2005 WL 49569, at *7 (Tenn. Crim. App. at Nashville, Jan. 5, 2005). Additionally, we note that the absence of processed methamphetamine or of some of the ingredients is not enough to reverse a manufacturing conviction. See State v. Raymond Lee Gibson, No. E2006-00450-CCA-R3-CD, 2007 WL 1237796, at *10 (Tenn. Crim. App. at Knoxville, Apr. 27, 2007) (upholding sufficiency of conviction for

manufacturing methamphetamine).

Turning to the present case, the officers found no methamphetamine on the appellant's person, in his car, or with the methamphetamine components in Worley's trailer. Although Detective Brown found white residue on the electronic scales from the appellant's car, the residue was not identified. Detective Brown testified that the three boxes in Worley's residence contained every ingredient necessary to manufacture methamphetamine, except pseudoephedrine and iodine. The appellant arrived at the residence with a large amount of cold medicine containing pseudoephedrine that was concealed in opened packaging for twelve pills. The individual bottles of ingredients found in the boxes in Worley's home contained varying amounts of their contents. These components included Mason jars containing sludge, also untested, and a wire strainer with a red stain. The boxes also contained aluminum foil already formed into balls, which Detective Brown testified were used in the gassing off process. A photograph of the components depicts five Pyrex dishes, four of which are blackened from use. We believe the evidence is sufficient to show a substantial step toward the attempt to manufacture methamphetamine.

The appellant also contends that the evidence fails to link him to the manufacturing components found in Worley's home. Possession of contraband, such as drugs, can be either actual or constructive. See State v. Transou, 928 S.W.2d 949, 955 (Tenn. Crim. App. 1996). As this court explained in State v. Cooper,

> [b]efore a person can be found to constructively possess a drug, it must appear that the person has "the power and intention at a given time to exercise dominion and control over . . . [the drug] either directly or through others." In other words, "constructive possession is the ability to reduce an object to actual possession." The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. Likewise, mere association with a person who does in fact control the drugs or property where the drugs are discovered is insufficient to support a finding that the person possessed the drugs.

736 S.W.2d 125, 129 (Tenn. Crim. App. 1987) (citations omitted).

Initially, we note that in determining the sufficiency of the evidence, we are limited to the evidence that was before the jury, i.e., the evidence presented at trial. Although Worley testified at the suppression hearing that the containers of methamphetamine components found in his house belonged to the appellant, he did not testify at trial. Moreover, the evidence shows that the appellant did not exercise control over the trailer in which the methamphetamine components were found. The State argues that the appellant's showing up at the residence with materials used to package methamphetamine and a large amount of cold medicine, one of the two ingredients necessary to manufacture methamphetamine in addition to those components already present in the containers, creates the sole reasonable inference that he could exercise control over those ingredients inside the

home as well. We disagree. In the absence of Worley's testimony that the containers in his home belonged to the appellant and that the appellant intended to return in a short time to retrieve them, the record contains no evidence that would allow a rational trier of fact to conclude that the containers belonged to the appellant. "[A]lthough a defendant's mere presence at a place where controlled substances are found will not support an inference of possession, . . . a person in possession of the premises where controlled substances are found may also be presumed to possess the controlled substances themselves." State v. Ross, 49 S.W.3d 833, 846 (Tenn. 2001). The appellant was not on the premises when the components were found, nor was there any evidence that he had ever been there.

This court has previously upheld the sufficiency of the evidence when a defendant fled the police, who later found a controlled substance in the area where the defendant had been. See State v. Vincent Conner, No. M2005-00887-CCA-R3-CD, 2006 WL 2563372, at *6 (Tenn. Crim. App. at Nashville, Aug. 23, 2006) (holding evidence sufficient for conviction of possession of cocaine with intent to sell when defendant ran from police, who later discovered a plastic bag of cocaine, only the bottom of which was wet from dew, a few feet from where the defendant was apprehended), perm. to appeal denied, (Tenn. 2006); State v. Louis Bernard Williams, No. W2005-01405-CCA-R3-CD, 2006 WL 1816388, at *4 (Tenn. Crim. App. at Jackson, June 30, 2006) (upholding sufficiency of the evidence of possession of marijuana with intent to sell when defendant owned and was sole occupant of residence in which marijuana was found and fled when police arrived with search warrant); State v. Reginald D. Hughes, No. M2003-00543-CCA-R3-CD, 2003 WL 22748463, at *4 (Tenn. Crim. App. at Nashville, Nov. 21, 2003) (holding evidence sufficient to support conviction for possession of cocaine when defendant in vehicle attempted to elude bicycle police then ran from his car between houses and officers subsequently found a bag of cocaine on top of debris between the houses and saw no one else between the houses). However, the jury heard no evidence that the appellant was ever in the presence of the methamphetamine components or even in Worley's trailer before his arrival in Worley's driveway and immediate attempt to leave. In short, the record is devoid of any evidence that the appellant had the ability to reduce the containers of components found in a bedroom of the residence to his actual possession. Therefore, the appellant's conviction for attempt to manufacture methamphetamine is reversed.

2. Felony Possession of Drug Paraphernalia

The appellant does not challenge the determination that he possessed drug paraphernalia but argues that the evidence is insufficient to show he intended to deliver the drug paraphernalia for the manufacture or packaging of methamphetamine. The State maintains that the jury could reasonably infer that the appellant intended to deliver the drug paraphernalia found on his person and in his car because he constructively possessed the containers of methamphetamine components found in Worley's trailer. We conclude that the evidence is sufficient.

As charged in the indictment, Tennessee Code Annotated § 39-17-425(b)(1) provides, in pertinent part, that

> it is unlawful for any person to . . . possess with intent to deliver . . . drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this part.

"Drug paraphernalia" is defined as "all equipment, products and materials of any kind which are used, intended for use, or designed for use in . . . manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body, a controlled substance[.]" Tenn. Code Ann. § 39-17-402(12). The appellant argues that the act of pulling into Worley's driveway while in possession of drug paraphernalia was insufficient to show he intended to deliver the paraphernalia. He also contends that because he did not constructively possess the items seized from Worley's home, they cannot be considered to show his intent to deliver in the absence of any evidence that he knew they were there.

A jury may derive a person's intent from both direct and circumstantial evidence. See State v. Washington, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983). Indeed, a "specific mental state (such as intent to deliver) is an element of almost all criminal offenses, and it is proven most often by circumstantial evidence." State v. Justin Bradley Haynie, No. W2006-01840-CCA-R3-CD, 2007 WL 4335481, at *15 (Tenn. Crim. App. at Jackson, Dec. 7, 2007), perm. to appeal denied, (Tenn. 2008) (affirming sufficiency of the evidence for possession of cocaine with intent to deliver).

In the present case, the direct evidence shows that the appellant possessed ninety-six cold tablets in a package designed for twelve tablets. The appellant turned into Worley's driveway with the cold medicine, the sole methamphetamine ingredient he possessed, and other drug paraphernalia, including equipment that could be used to make and package methamphetamine, in his car. The circumstances surrounding his entry into Worley's driveway were that the police had discovered Worley's home contained all the ingredients necessary to manufacture methamphetamine except for iodine and large amounts of pseudoephedrine. Detective Brown testified that as a general rule, a large amount of pseudoephedrine was necessary to manufacture methamphetamine. The record contained no other explanation for the appellant's possession of such a large amount of cold medicine, other than the inference that he intended to deliver it to someone at Worley's home for use in the manufacture of methamphetamine.

Although we determined above that the State failed to prove the appellant constructively possessed the containers of methamphetamine components found in Worley's home, the evidence still circumstantially shows the appellant's intent with regard to the drug paraphernalia on his person and in his car. The fact that the jury did not know to whom the methamphetamine components in Worley's residence belonged does not prevent it from determining that the appellant intended for his pseudoephedrine to go with the other components. In other words, the State's failure to prove that

the appellant constructively possessed the methamphetamine components inside the trailer does not prevent the use of those components as circumstantial evidence to show the appellant's intent with regard to the drug paraphernalia he unquestionably possessed. Accordingly, we hold that the evidence is sufficient to support the appellant's conviction for felony possession of drug paraphernalia.

D. Double Jeopardy

The appellant argues that his convictions for attempt to manufacture methamphetamine and felony possession of drug paraphernalia violate the constitutional prohibition against double jeopardy. He also argues that possession of the drug paraphernalia was "essentially incidental" to the underlying felony of attempt to manufacture methamphetamine. Although we have reversed the appellant's conviction for attempt to manufacture methamphetamine, we will address the issues in case of further appellate review.

The double jeopardy clauses of the United States and Tennessee Constitutions protect an accused from (1) a second prosecution following an acquittal; (2) a second prosecution following conviction; and (3) multiple punishments for the same offense. See State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996). The present case involves the third category. In Tennessee, whether two offenses are the "same" for double jeopardy purposes depends upon a close and careful analysis of the offenses involved, the statutory definitions of the crimes, the legislative intent, and the particular facts and circumstances. See State v. Black, 524 S.W.2d 913, 919 (Tenn. 1975). This analysis is guided in part by the application of the following test announced in Blockburger v. United States:

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Black, 524 S.W.2d at 919 (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932)). In order to determine if double jeopardy attaches, our supreme court devised the following four-part test:

> (1) a Blockburger analysis of the statutory offenses;
>
> (2) an analysis, guided by the principles of [Duchac v. State, 505 S.W.2d 237, 239 (Tenn. 1973)], of the evidence used to prove the offenses;
>
> (3) a consideration of whether there were multiple victims or discrete acts; and
>
> (4) a comparison of the purposes of the respective statutes.

Denton, 938 S.W.2d at 381. However, "if the offenses are the "same" under Blockburger, the federal constitutional double jeopardy protections have been violated and the inquiry may end." State v. Hayes, 7 S.W.3d 52, 55 (Tenn. Crim. App. 1999).

As stated previously, an attempt to manufacture methamphetamine requires a "substantial step" taken toward the act of producing methamphetamine. See Tenn. Code Ann. §§ 39-17-408(d)(2), -417(a)(1), -402(15), 39-12-101(a)(3). In contrast, possession of drug paraphernalia requires proof that a defendant possessed equipment, products, or materials with intent to deliver the materials when the defendant knew or should have known that the materials would be used for any number of activities, including manufacturing, analyzing, or packaging a controlled substance. See Tenn. Code Ann. §§ 39-17-425(b)(1), -402(12). The offenses as charged in the instant case require different elements. For example, possession of drug paraphernalia requires the element of an intent to distribute that is not required in an attempt to manufacture methamphetamine. Moreover, as demonstrated by our reversal of the appellant's conviction for attempting to manufacture methamphetamine, the facts underlying the appellant's convictions are not "inherently interwoven" so as to make the offenses "essentially incidental" to each other. Therefore, dual convictions for attempting to manufacture methamphetamine and possession of drug paraphernalia with intent to distribute do not violate double jeopardy protections.

E. Bill of Particulars

The appellant contends that the trial court erroneously ruled that broad discovery from the State sufficed for a bill of particulars. He maintains that the lack of a bill of particulars prevented him from defending the case effectively because he did not know whether each of the charges related to the items seized from his person and car or those taken from Worley's home. The State argues that the appellant was fully apprised of the charges against him from the information he gained at the preliminary hearing, in discovery, and from the suppression hearing testimony. We hold that the trial court did not abuse its discretion by finding that the State's failure to provide a bill of particulars as ordered did not harm the appellant.

According to the indictments, the appellant was charged with "knowingly attempt[ing] to manufacture . . . Methamphetamine . . . in violation of [Tennessee Code Annotated sections] 39-17-417 and . . . 39-12-101" on May 3, 2004. Count two charged that on May 3, 2004, the appellant

> did . . . knowingly deliver, or possess with intent to deliver or manufacture with intent to deliver, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, or introduce into the human body a controlled substance, in violation of [Tennessee Code Annotated section] 39-17-425[.]

The appellant moved pretrial for a bill of particulars, alleging that the indictment did not inform him of how he was attempting to manufacture methamphetamine in count one or what the State

considered to be drug paraphernalia in count two. He maintained that this information was particularly important because "all the process and the items upon which the State relies are legal." At the hearing on the motion to suppress, the trial court ruled that the appellant was entitled to the information he was requesting in a bill of particulars. Following the ruling, the State agreed to provide a written bill of particulars. However, the record does not reveal that the State ever provided the bill of particulars as ordered. On the day of trial, the appellant's counsel noted in a jury-out hearing that the trial court had ruled earlier that morning that his request for a bill of particulars was satisfied by the discovery provided by the State.

Tennessee Rule of Criminal Procedure 7(c) provides that "[u]pon motion of the defendant[,] the court may direct the filing of a bill of particulars so as to adequately identify the offense charged." The decision whether to order a bill of particulars lies in the discretion of the trial court, and this court will not reverse the trial court's denial of a bill of particulars absent a showing that the trial court abused its discretion. See State v. Stephenson, 878 S.W.2d 530, 539 (Tenn. 1994), abrogated on other grounds by State v. Saylor, 117 S.W.3d 239, 246 (Tenn. 2003) (holding that an officer may continue to question a suspect who equivocates in requesting counsel).

There are three purposes for a bill of particulars: (1) to provide the defendant with information about the details of the charge if necessary for the preparation of the defense; (2) to avoid prejudicial surprise at trial; and (3) to enable the defendant to preserve a claim of double jeopardy. State v. Byrd, 820 S.W.2d 739, 741 (Tenn. 1991). The Advisory Commission Comments to Rule 7(c), Tennessee Rule of Criminal Procedure, state that the purpose of the bill of particulars is to enable the defendant to know "precisely what he or she is charged with." It is not meant to be used for the purposes of broad discovery. See Tenn. R. Crim. P. 7(c), Advisory Commission Comments; see also Stephenson, 878 S.W.2d at 539; State v. Green, 995 S.W.2d 591, 602 (Tenn. Crim. App. 1998).

"'The test in passing on a motion for a bill of particulars should be whether it is necessary that [the] defendant have the particulars sought in order to prepare his defense and in order that prejudicial surprise will be avoided.'" State v. Hicks, 666 S.W.2d 54, 56 (Tenn. 1984) (quoting 1 C. Wright, Federal Practice and Procedure, Criminal, § 129 (1982)). If the needed information is in the indictment or has been provided by the State in some other satisfactory form, no bill of particulars is required. Id. A bill of particulars is not intended to be a means of learning the State's evidence and theories, although to the extent the information sought is necessary, it will be required, even if to do so discloses the State's evidence or theories. Id.

The indictment in the present case charges the statutory language and cites to the Tennessee code but does not provide factual information about how the appellant attempted to manufacture methamphetamine or the nature of the drug paraphernalia that the appellant possessed with intent to deliver. The appellant challenged this lack of specificity at the hearing on his motion to suppress. At that hearing, Detective Brown testified about the methamphetamine components found in three containers in Worley's home. He also detailed the items seized from the appellant's person and car on May 3, 2004. At the conclusion of his direct examination, Detective Brown explained that he

charged the appellant with the present offenses "[b]ecause of what was found in the home as well as what Mr. Best had on his person at the time." Worley also testified at the suppression hearing and explained that Best had left the three containers of methamphetamine components at his home. The appellant had an opportunity to cross-examine both of these witnesses. Accordingly, the record reflects that the appellant knew the State's theory of the case at the time of trial. The appellant has not pointed to any information of which he was unaware at trial nor has he shown that he was surprised by the State's proof. Finally, we note that the lack of a bill of particulars did not prevent the appellant from raising a double jeopardy issue before the trial, at the hearing on the motion for a new trial, and on direct appeal. We conclude that the appellant was not prejudiced in his ability to prepare his defense by the State's failure to provide a bill of particulars. See Stephenson, 878 S.W.2d at 539. Thus, the trial court did not abuse its discretion by determining that the appellant was not harmed by the absence of a written bill of particulars.

F. Prosecutorial Misconduct

The appellant argues that the trial court erroneously permitted the prosecutor to argue during closing statement that the appellant was trying to trick the jury by his attempting to plead guilty to simple possession of drug paraphernalia. He asserts that this accusation was disparaging to him and his attorney. The State maintains that the appellant cannot show that the comment was so inflammatory that it affected the verdict to the appellant's detriment. We hold that the statement by the prosecutor was at most harmless error.

Just before opening statements, the trial court asked the appellant's attorney in the jury's presence, "[H]ow does [the appellant] plead?" Defense counsel responded, "Your Honor, [he] pleads guilty to the offense of simple possession of drug paraphernalia in Count 2. He pleads not guilty to everything else." The trial court informed the jury that the appellant had been charged with felony possession of drug paraphernalia in count 2 and that, despite the appellant's so-called plea, "[t]he state is still entitled to proceed to trial on the felony count as well. So at this point as to both counts charged [he has] entered not guilty pleas to those." Prior to closing argument, the trial court instructed the jurors that the "[s]tatements, arguments, and remarks of counsel" were to guide the jurors but were not evidence in the case. During the State's closing argument, the following exchange transpired:

> [Prosecutor]: And you heard him plead guilty this morning to a misdemeanor paraphernalia, and you could certainly find him guilty of that, but you consider the felony charges as well. Don't be tricked by that "Well, I will plead guilty to the misdemeanor –
>
> [Defense Counsel]: Your Honor, we are going to object to that type of a characterization –
>
> [Trial Court]: I'm going to overrule your objection. You may argue otherwise to the jury.

> [Prosecutor]: Don't be tricked by it, you consider the felony.

During the appellant's rebuttal closing argument, defense counsel stated the following with regard to the appellant's "guilty plea" to simple possession:

> [Defense Counsel]: And Mr. Best isn't trying to trick you because he came in today and said, "Yes, I had this stuff in my possession and they stopped me." It is simple possession of drug paraphernalia and that's what it is.

The appellant raised this issue in his amended motion for a new trial, which was denied by the trial court.

It is well-established that closing argument is an important tool for both parties during a trial. Thus, counsel is generally given wide latitude during closing arguments, and the trial court is granted wide discretion in controlling closing arguments. See State v. Carruthers, 35 S.W.3d 516, 577-78 (Tenn. 2000) (appendix). "Notwithstanding such, arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003).

"In determining whether statements made in closing argument constitute reversible error, it is necessary to determine whether the statements were improper and, if so, whether the impropriety affected the verdict." State v. Pulliam, 950 S.W.2d 360, 367 (Tenn. Crim. App. 1996). In connection with this issue, we must examine the following factors:

> "(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case[;]
>
> (2) the curative measures undertaken by the court and the prosecution[;]
>
> (3) the intent of the prosecutor in making the statement[;]
>
> (4) the cumulative effect of the improper conduct and any other errors in the record[; and]
>
> (5) the relative strength or weakness of the case."

Id. at 368 (quoting Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)).

Initially, we observe that the appellant could not actually plead guilty to simple possession of drug paraphernalia of his own accord. A defendant seeking to plead guilty without a plea

agreement with the State can only plead to the offense as charged. Parham v. State, 885 S.W.2d 375, 379 (Tenn. Crim. App. 1994). Nevertheless, we agree with the appellant that the prosecutor's characterization of the appellant's attempt to enter a guilty plea to simple possession as a "trick" was improper. See State v. Jimmy Dale Pickett, No. M2005-02434-CCA-R3-CD, 2007 WL 471136, at *13 (Tenn. Crim. App. at Nashville, Feb. 14, 2007) (observing that comments during closing argument about defense tactics are improper), perm. to appeal denied, (Tenn. 2007); State v. Garner Dwight Padgett, No. M2003-00542-CCA-R3-CD, 2004 WL 2359849, at *12 (Tenn. Crim. App. at Nashville, Oct. 21, 2004) (stating that "[t]he prosecution is not permitted to reflect unfavorably upon defense counsel or the trial tactics employed during the course of the trial").

Nevertheless, defense counsel was able to explain in closing argument why the appellant had offered to enter a guilty plea to simple possession. Moreover, we discern no sinister intent on the part of the prosecutor in making the unfavorable characterization. Instead, the record reveals that the statement was an attempt by the prosecutor to focus the jury's attention on the allegation at hand, whether the appellant was guilty of felony possession of drug paraphernalia, rather than an effort to denigrate defense counsel. Moreover, although the trial court took no curative measures following the prosecutor's comment, it did instruct the jury prior to closing argument that the arguments of counsel were not evidence. Finally, given the strength of the State's case on the felony possession of drug paraphernalia, we conclude that the prosecutor's comment was harmless error. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

G. Excessive Fines

At the appellant's motion for new trial hearing, he raised the issue of excessive fines. Defense counsel argued that the appellant was indigent and depended upon Social Security disability payments. Counsel told the trial court that the appellant's probation officer was present at the hearing and could testify that the appellant received Social Security disability payments, but the trial court heard no proof on the matter. The trial court declined to reduce the appellant's fines, stating that it would revisit the issue near the end of the appellant's probationary period in the event that the appellant's circumstances changed in the interim. On appeal, the appellant contends that his receiving the maximum fines for both of his convictions is excessive in light of his indigency and his receipt of disability payments. However, he has failed to include a copy of the sentencing hearing transcript or the presentence report in the record on appeal. It is the appellant's duty to "have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). Without a proper record for our review, we must presume that the findings of the trial court are correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of conviction for possession of drug paraphernalia but reverse the appellant's conviction for attempt to manufacture methamphetamine.

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NORMA McGEE OGLE, JUDGE